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SUPREME COURT DECISIONS ON THE COMMERCE CLAUSE AND STATE POLICE POWER, 1910-1914 I

Out of the silence of the federal Constitution the Supreme Court of the United States has made much law on the issue of the power of the states over interstate and foreign commerce. True, this constitutional silence is not 100%, since the states are forbidden without the consent of Congress to lay any imposts or duties on imports or exports or any duty of tonnage. These prohibitions, however, are confined to the exercise of state fiscal power and they give rise to relatively few disputes. Most of the quarrels over alleged state interference with interstate and foreign commerce depend for their settlement upon inferences from the so-called commerce clause which says only that "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This clause maintains an immaculate silence with respect to the power of the states, and the message of this silence is recurrently revealing itself to the Supreme Court.[1]

[1] Two other clauses of the Constitution have a possible bearing on the issues under consideration. Article VI declares that "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." This reinforces the specific prohibitions on state taxation contained in the Constitution and also in effect prescribes the subordination of state laws to lawful exercises of congressional power. This subordination, however, carries no implication as to the extent of state police power in the absence of congressional action.

The Tenth Amendment declares that the powers not delegated to the United States are reserved to the states or to the people. Since power over interstate and foreign commerce is delegated to the United States, it is not "reserved" to the states by this clause. This means only that the Tenth Amendment does not give to the states a guarantee of power over interstate and foreign commerce. Conceivably the Tenth Amendment might have been construed to mean that powers not guaranteed to the states are denied to them, but this has not been its construction. Since the states need not look to the federal Constitution for the source of their power, they may continue to exercise the powers enjoyed prior to the Constitution unless in some way the Constitution inhibits such exercise. The Tenth Amendment contains no such inhibitions. Where it fails to "reserve" a power to the states, it leaves the matter where it stood under the original Constitution. The

The revelations during the quadrennium from October, 1910, to June, 1914, are the stuff of this paper and two others to follow. Later revelations have been exposed elsewhere [2] and the method there adopted is used here. The effort is to squeeze the juice from the opinions of the judges without any admixture of extraneous matter that might make it ferment. For those who crave the effects of fermentation the footnotes point the way to articles and notes in legal periodicals during the period under review. References appended to the citations of cases considered in the text are to discussions of those cases or of others on the same point. The combings of the law reviews on other issues of alleged conflict between the commerce clause and state police power are tied to the Supreme Court cases which they come most closely to matching. The present instalment on state police power in the absence of congressional action will be followed by one on state police power after congressional action. A later article will review the decisions of the same period on the relation between the commerce clause and the taxing power of the states.

I State Power in the Absence of Congressional Action

From the inauguration of government under the federal Constitution until 1851 it was a mooted question whether the power of Congress over interstate commerce is exclusive or concurrent, *i. e.*, whether the grant to Congress is of all power over such commerce leaving no residuum to the states or is merely a permission to Congress to act, with no implied prohibition on the states other than not to step on territory that Congress has staked out or occupied. In 1851 it was laid down that the power of Congress is exclusive only with respect to subject matters of interstate commerce in which uniformity of regulation is essential or highly desirable, and that the states have concurrent power over such subjects as appropriately admit of diversity of regulation in different localities.[3]

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question of the power of the states over commerce depends, therefore, upon the nature of the commerce power conferred upon Congress. The development of the doctrine on this point is indicated briefly in the text.

[2] Reviews of Supreme Court decisions on constitutional questions from 1914 to 1921 appear in (1918) 12 American Pol. Sci. Rev. 17-49, 427-457, 640-666; (1919) 13 *ibid.* 47-77, 229-250, 607-633; (1920) 14 *ibid.* 53-73; (1920) 19 Michigan Law Rev. 1-34, 117-151, 283-323; and in four articles to appear in (1921-1922) 20 Michigan Law Rev. A review of Supreme Court decisions from 1910 to 1914 on federal power over commerce will appear in three articles in (1921-1922) 6 Minnesota Law Rev.

[3] For articles on various aspects of the general problem of the relation between federal and state power over commerce see Frederick H. Cooke, *The Power of Congress and of the States Respectively, to regulate the Conduct and Liability of Carriers* (1910) 10 Columbia Law Rev. 35; *Nature and Scope of the Power of Congress to Regulate Commerce* (1911) 11 Columbia Law Rev. 51; *The Source of Authority to Engage in Interstate Commerce* (1911) 24 Harvard Law Rev. 635; *The Gibbons* v. *Ogden Fetish* (1911) 9 Michigan Law Rev. 324; *The Use and the Abuse of the Commerce Clause* (1911) 10 Michigan Law Rev. 93; *The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Commerce* (1911) 20 Yale Law Journ. 297; and *The Right to Engage in Interstate Transpor-*

Among the subjects early held to belong to this latter class are ferries, which from the beginning had been dealt with by the states and left untouched by Congress. Later decisions cast doubt upon the continuing authority of the prior ones and the extent of state power over interstate ferries became uncertain. The question was considered by Chief Justice White in *New York C. & H. R. R. Co.* v. *Board of Chosen Freeholders*[4] in 1913, but no definite conclusion was reached since it was held that Congress had taken control of ferries operated as a part of an interstate railroad system and that the attempt of the state to regulate the rates of such ferries was precluded by superior federal action.

At the next term of court two cases presented the question of state power over certain ferries which were concededly not covered by any federal regulation. *Port Richmond & B. P. F. Co.* v. *Hudson County*[5] involved an order of a New Jersey authority fixing the rates to be taken on the New Jersey side of a ferry between New Jersey and Staten Island, New York, for the transportation of foot passengers for single trips to the New York terminal and for round trip tickets to that terminal and return. After reviewing the tortuous course of previous decision, Mr. Justice Hughes observed:

"Coming then to the question now presented—whether a state may fix reasonable rates for ferriage from its shore to the shore of another state,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation."[6]

The opinion refers to the established rule that interstate railroad rates require uniformity of regulation and therefore are within federal power exclusively, and continues:

"But, in the case of ferries, we have a subject of a different character.

tation, etc. (1912) 21 Yale Law Journ. 207; Frank B. Kellogg, *Federal Incorporation and Control* (1910) 20 Yale Law Journ. 177; Edward Lindsey, *Wilson Versus The "Wilson Doctrine"* (1910) 44 American Law Rev. 641; Victor Morawetz, *The Power of Congress to Enact Incorporation Laws and to Regulate Corporations* (1913) 26 Harvard Law Rev. 667; Charles W. Needham, *The Exclusive Power of Congress Over Interstate Commerce* (1911) 11 COLUMBIA LAW REV. 251; Dorrance Dibell Snapp, *National Incorporation* (1911) 5 Illinois Law Rev. 414; and Edmund F. Trabue, *Contract Limitation of Common Carrier's Liability, State and Federal* (1914) 48 American Law Rev. 50. In (1910) 5 Illinois Law Rev. 57, 123, various articles on interstate commerce are reviewed and criticised by Henry Schofield.

[4] (1913) 227 U. S. 248, 33 Sup. Ct. 269.

[5] (1914) 234 U. S. 317, 34 Sup. Ct. 821. See (1914) 63 Univ. of Pennsylvania Law Rev. 127 and (1914) 24 Yale Law Journ. 80. The decision in the state court is considered in (1911) 24 Harvard Law Rev. 324.

[6] (1914) 234 U. S. 317, 330, 34 Sup. Ct. 821.

We dismiss from consideration those ferries which are operated in connection with railroads, and cases, if any, where the ferriage is part of a longer and continuous transportation. Ferries, such as are involved in the present case, are simply means of transit from shore to shore. These have always been regarded as instruments of local convenience which, for the proper protection of the public, are subject to local regulation; and where the ferry is conducted over a boundary stream, each jurisdiction with respect to the ferriage from its shore has exercised this protective power. There are a multitude of such ferries throughout the country and, apart from certain rules as to navigation, they have not engaged the attention of Congress. We also put to one side the question of prohibitory or discriminatory requirements, or burdensome exactions imposed by the state, which may be said to interfere with the guaranteed freedom of interstate intercourse or with constitutional rights of property. The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with federal rules. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question, we can entertain no doubt. It is true that in the case of a given ferry between two states there might be a difference in the charge for ferriage from one side as compared with that for ferriage from the other. But this does not alter the aspect of the subject. The question is still one with respect to a *ferry* which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local requiring regulation according to local conditions. It has never been supposed that because of the absence of federal action the public interest was unprotected from extortion and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly or to establish for that purpose a federal agency. The matter is illuminated by the consideration of this alternative for the point of the contention is that, there being no federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the states are obvious and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, " . . . its action will of course control." [7]

It is then pointed out that the power of New Jersey to fix the rate from its shore cannot derogate from the power of New York to fix the rates

[7] *Ibid.* 331-332.

for traffic originating on its side. The order under review was so constructed as not to require the sale of round trip tickets but merely to fix their price if sold on the New Jersey side. As such it was declared to be valid, "being one relating to the transactions of the company in New Jersey and the charges there enforced." It was explicitly stated that no opinion was expressed on the question whether the state could require the company to sell round trip tickets.

On the same day *Sault Ste. Marie* v. *International Transit Co.*[8] held it an unconstitutional regulation of foreign commerce for a city to require an international ferry to take out a license and pay a fee as a condition precedent to doing business. Mr. Justice Hughes pointed out that if the state or city could make its consent necessary to the lawful conduct of a ferry it might withhold such consent and thereby forbid the commerce in which the ferry is engaged. This was said to go beyond the regulation of rates and to be in conflict with the established principle "that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce." The phrase "otherwise enjoying full capacity for the purpose" might seem to leave open the question whether, as held in some early cases, a state may confer an exclusive franchise to run an interstate ferry; but the inference from the whole opinion is that the earlier decisions are regarded as abandoned by an intervening case which forbade a state to impose a tax on the business of running an interstate ferry. In the present case the company had a Canadian franchise which provided that it should not infringe any of the regulations of Michigan or of the town of Sault Ste. Marie that might be applicable. It does not appear that the company had any franchise from Michigan. The only facts given are that it leased a private wharf in Sault Ste. Marie and there maintained an office where fares were received. Nothing is made of the fact that this was an international, rather than an interstate, ferry, and it is clear that the decision applies to both.

Cases in which the orders of state commissions with respect to railway rates are questioned as unlawful regulations of interstate commerce may appropriately be grouped in this section since the states were forbidden to regulate interstate rates even before Congress had undertaken such regulation.

Ohio R. R. Comm. v. *Worthington*[9] shows that the states cannot regulate interstate rates even though they are rates to which the authority of the Interstate Commerce Commission has not been extended by Congress. The order here involved was one issued by the Ohio Commission imposing a rate of 70 cents a ton for coal shipped from Ohio mines to Ohio lake ports and there loaded on lake vessels. The coal was

[8] (1914) 234 U. S. 333, 34 Sup. Ct. 826.
[9] (1912) 225 U. S. 101, 32 Sup. Ct. 653. See (1913) 11 Michigan Law Rev. 593.

billed to the mine operator and not to parties outside Ohio; but the rate prescription of the state commission applied only to coal put on vessels, and covered the loading on the vessel. Practically all the coal loaded on the vessels went to points outside Ohio. Under these circumstances the court held that the only coal to which the rate applied is already on its interstate journey when carried over Ohio railroads from the mine to the lake. It was urged on behalf of the state commission that such shipment is not within the jurisdiction of the Interstate Commerce Commission because this extends to shipments partly by rail and partly by water only when the rail and the water carriage are under a common control and management or an arrangement for continuous carriage. This contention was resisted by the carrier, but the court refused to pass upon it, saying instead that "it is enough now to hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce and is therefore beyond the power of the state or a commission assuming to act under its authority." [10]

The doctrine of the *Worthington* case was applied to two similar situations in *Texas & N. O. R. Co.* v. *Sabine Tram Co.*[11] and *Railroad Commission* v. *Texas & P. R. Co.*[12] In both cases the carriers had charged the higher rates authorized by the Interstate Commerce Commission. In the former the shipper sued to recover the difference between these rates and the lower ones fixed by the Texas commission, and in the latter the carrier sued the Louisiana commission to enjoin the enforcement of its orders and the imposition of penalties for their violation. The Sabine Company shipped lumber from interior Texas points to Texas gulf ports where it was unloaded on to docks in reach of ship's tackle and then put on ships chartered to take it to foreign ports. This was the continuing course of business. It was held not to matter that the shipper had no concern with the lumber after it reached the docks nor that all arrangements for loading the boats were in charge of the purchaser and consignee. The facts in the other case were similar with the added element that the state commission allowed only four days free time for unloading except when the consignment was for export, and the carriers had invariably allowed more than four free days. After citing prior decisions Mr. Justice McKenna concluded:

[10] For a consideration of the power of a state over rates for carriage between two points in the state over a water route partly on the high seas, see (1914) 2 California Law Rev. 231; and (1914) 27 Harvard Law Rev. 686. State power over the rates on electric railroads is discussed in Borden D. Whiting, *Street Railways and the Interstate Commerce Act* (1910) 10 COLUMBIA LAW REV. 451; and in a note in (1912) 10 Michigan Law Rev. 498. A case denying the power of a state to fix interstate rates in the charter of a road is treated in (1913) 26 Harvard Law Rev. 539, 554; and a like inhibition on state power over interstate rates on a road owned by it and leased to a carrier is dealt with in (1913) 11 Michigan Law Rev. 321.

[11] (1913) 227 U. S. 111, 33 Sup. Ct. 229. See (1913) 26 Harvard Law Rev. 554; and (1913) 11 Michigan Law Rev. 593.

[12] (1913) 229 U. S. 336, 33 Sup. Ct. 837. See (1914) 2 Georgetown Law Journ. 23.

"In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or State control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for trans-shipment at New Orleans." [13]

These decisions assume that rates fixed by state authority are applicable to intrastate transportation. The *Minnesota Rate Cases* [14] held that, in the absence of opposing federal action, this state power to prescribe intrastate rates continues to exist even though the intrastate rates fixed by the state are lower than corresponding interstate rates approved by the Interstate Commerce Commission and so result in discrimination in favor of intrastate traffic against competing interstate traffic. In a voluminous opinion which is almost a treatise on the commerce clause Mr. Justice Hughes reviews the various local incidents of interstate commerce which the states may regulate in the absence of federal action and adds that "it is manifest that when the legislation of the state is limited to internal commerce to such a degree that it does not include even incidentally the subject of interstate commerce, it is not rendered invalid because it may affect the latter commerce indirectly." After quoting from many opinions in which the power of the states to regulate intrastate rates has been sanctioned and saying that the state might build and operate railroads within their respective borders, he continues:

"Similarly, the authority of the State to prescribe what shall be reasonable charges of common carriers for interstate [*sic*] transportation, unless it be limited by exertion of the constitutional power of Congress, is statewide. As a power appropriate to the territorial jurisdiction of the State, it is not confined to a part of the State, but extends throughout the State,—to its cities adjacent to its boundaries as well as to those in the interior of the State. To say that this power exists, but that it may be

[13] (1913) 229 U. S. 336, 341-342, 33 Sup. Ct. 837.

[14] (1913) 230 U. S. 352, 33 Sup. Ct. 729. See Jay Newton Baker, *The Limitation of State Control over the Regulation of Rates* (1911) 21 Yale Law Journ. 126; John Bauer, *The Minnesota Rate Cases: The Problem of Federal versus State Railway-Rate Control* (1914) 29 Political Sci. Quart. 57; William C. Coleman, *The Vanishing Rate-Making Power of the States* (1914) 14 COLUMBIA LAW REV. 122; Allan P. Matthew, *The Minnesota Rate Cases* (1913) 1 California Law Rev. 439; Hannis Taylor, *The Minnesota Rate Cases* (1913) 27 Harvard Law Rev. 14; and a note in (1913) 12 Michigan Law Rev. 58. For discussions prior to the decision in the Supreme Court see William C. Coleman, *The Commerce Clause and Intrastate Rates* (1912) 12 COLUMBIA LAW REV. 321; and notes in (1911) 24 Harvard Law Rev. 679; (1911) 10 Michigan Law Rev. 134; and (1911) 17 Virginia Law Reg. 487.

exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intra-state service is itself subject to the carrier's will. But this state-wide authority controls the carrier, and is not controlled by it; and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border is foreign to our jurisprudence." [15]

The next inquiry was whether Congress had so acted as to preclude the action of the state in fixing local rates that discriminate against interstate commerce. This was answered in the negative. This part of the case will be treated in the succeeding section dealing with state police power and interstate commerce after Congress has acted. The principal case was followed in *Missouri Rate Cases,*[16] *Chesapeake & Ohio R. Co.* v. *Conley,*[17] *Oregon Railroad & Navigation Co.* v. *Campbell,*[18] *Southern Pacific Company* v. *Campbell,*[19] *Allen* v. *St. Louis, I. M. & S. R. Co.,*[20] and *Louisville & Nashville R. Co.* v. *Garrett.*[21]

While recognized state regulations of interstate commerce are sustained only when the commerce in question is of the sort that satisfactorily admits of diversity of treatment in different localities, not all state laws which bear on the commerce that is thought to require uniformity of treatment are thereby rendered inapplicable. State police measures derive their sanction from the general authority enjoyed by the state and are sustained as an exercise of that authority up to the point where in their application to interstate commerce they enter upon the field in which Congress has exclusive control. The doctrine is that, even as to the interstate commerce which is national in character and requires uniformity of regulation and over which, therefore, the commerce power of Congress is exclusive, state laws are allowed to apply if they merely incidentally affect such commerce and fall short of regulating it. To the factually-minded person this means that the states may regulate interstate commerce some but not too much. Most of the cases remaining for consideration are concerned with drawing the line between the points where "some" leaves off and "too much" begins.

Three cases on the applicability of state laws to the liability of telegraph companies for neglect in handling interstate messages borrow a test from the principles of conflict of laws to determine whether the state in the absence of congressional action is "regulating" interstate commerce or merely "incidentally affecting" it.

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[15] (1913) 230 U. S. 352, 417, 33 Sup. Ct. 729.
[16] (1913) 230 U. S. 474, 33 Sup. Ct. 975.
[17] (1913) 230 U. S. 513, 33 Sup. Ct. 985.
[18] (1913) 230 U. S. 525, 33 Sup. Ct. 1026.
[19] (1913) 230 U. S. 537, 33 Sup. Ct. 1027.
[20] (1913) 230 U. S. 553, 33 Sup. Ct. 1030.
[21] (1913) 231 U. S. 298, 34 Sup. Ct. 48.

In *Western Union Telegraph Co.* v. *Commercial Milling Co.*[22] the state of origin of an interstate message was allowed to apply a statute forbidding the company to limit its liability for negligent non-delivery. While the default here occurred outside the state of origin, the contract was made in that state and the statute forbidding limitation of liability was regarded as a regulation of that contract. This was distinguished from another case in which a statute of the state of origin penalizing defective delivery in the state of destination was held a regulation of interstate commerce. That statute was said to impose affirmative duties in another state, ignoring the requirements of the laws of that state, and giving "an action for damages against the permission of such laws for acts done within its jurisdiction." The difference between that case and the one before the court was put by Mr. Justice McKenna as follows:

"The former imposed affirmative duties and regulated the performance of the business of the telegraph company. . . . Such a statute was plainly a regulation of interstate commerce, and exhibited in a conspicuous degree the evils of such interference by a State and the necessity of one uniform plan of regulation. The statute of Michigan has no such objectionable qualities. It imposes no additional duty. It gives sanction only to an inherent duty. It declares that in the performance of a service, public in its nature, that it is a policy of the State that there shall be no contract against negligence. The prohibition of the statute, therefore, entails no burden. It permits no release from that duty in the public service which men in their intercourse must observe,—the duty of observing the degree of care and vigilance which the circumstances justly demand, to avoid injury to another." [23]

In *Western Union Telegraph Co.* v. *Crovo* [24] the state of origin of an interstate message was allowed to impose a penalty on the company for a negligent failure to transmit the same promptly when such negligence occurred in the state of origin. The case was likened to an earlier one in which the state of destination was allowed to penalize delay in delivery and was distinguished from one in which the state of origin was not allowed to penalize delay in delivery.

Like the case thus distinguished is *Western Union Telegraph Co.* v. *Brown* [25] which reversed the South Carolina court for applying a South Carolina statute giving damages for mental anguish for delay in delivering messages, to a message sent promptly from South Carolina to Washington, D. C., but there delayed in delivery. Notwithstanding the prevailing rule that state decisions applying one rule of conflict of laws rather than another do not raise questions under the federal Constitution, Mr. Justice Holmes reverses the state court on grounds of conflict of laws when he says:

[22] (1910) 218 U. S. 406, 31 Sup. Ct. 59. Mr. Justice Holmes dissents. See (1910) 24 Harvard Law Rev. 404.
[23] (1910) 218 U. S. 406, 416, 31 Sup. Ct. 59.
[24] (1911) 220 U. S. 364, 31 Sup. Ct. 399. See (1910) 9 Michigan Law Rev. 718.
[25] (1914) 234 U. S. 542, 34 Sup. Ct. 955.

"The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act of omission complained of is obvious; and when a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail. The principle would be illustrated by supposing a direct clash between the state and Federal statutes, but it is the same whenever the State undertakes to go beyond its jurisdiction into territory where the United States has exclusive control." [26]

It is only for extra measure that the commerce clause is adduced in the final paragraph:

"What we have said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the States. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one State to another or to this District by determining the consequences of not pursuing such conduct, and in that way encounters *Western Union Telegraph Co.* v. *Pendleton,* 122 U. S. 347, a decision in no way qualified by *Western Union Telegraph Co.* v. *Commercial Milling Co.* 218 U. S. 406." [27]

Several cases sustained state requirements confined to carriers. In each case the complaining carrier was engaged in interstate transportation.

Martin v. *West* [28] enforced as against a ship engaged in interstate commerce a lien imposed by state law for an injury to a drawbridge. After holding that the tort in question was non-maritime and so not within the federal admiralty jurisdiction, Mr. Justice Van Devanter answered the objection under the commerce clause by saying:

"We do not perceive in the statute, as interpreted and applied in the present case, any basis for this contention. As interpreted, the statute embraces all vessels, whether domestic or foreign and whether engaged in intrastate or interstate commerce, and therefore it cannot be said that its purpose is to regulate the latter. Its enforcement may occasionally and temporarily interrupt or prevent the use of a vessel in such commerce, as in this instance, but such an interference is incidental only, is almost inseparable from the compulsory enforcement of liabilities of the class in question, is not in conflict with any regulation of Congress, and does not in itself offend against the commerce clause of the Constitution." [29]

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[26] *Ibid.* 547.

[27] *Ibid.* The states have now been deprived of power over the liability for defaults in connection with interstate messages by reason of congressional action which is treated as having taken possession of the field. See *Postal Telegraph-Cable Co.* v. *Warren-Goodwin Lumber Co.* (1919) 251 U. S. 27, 40 Sup. Ct. 69; and *Western Union Telegraph Co.* v. *Boegli* (1920) 251 U. S. 315, 40 Sup. Ct. 167. The issue in these cases is treated in (1918) 18 COLUMBIA LAW REV. 612; (1919) 33 Harvard Law Rev. 988; (1919) 14 Illinois Law Rev. 525; (1919) 5 Iowa Law Bull. 280; (1919) 18 Michigan Law Rev. 248, 418; (1919) 4 Minnesota Law Rev. 293; (1919) 68 Univ. of Pennsylvania Law Rev. 259; and (1919) 29 Yale Law Journ. 566.

[28] (1911) 222 U. S. 191, 32 Sup. Ct. 42.

[29] *Ibid.* 198. The attachment under state law of cars in interstate transit is considered in (1913) 62 Univ. of Pennsylvania Law Rev. 60, and in (1910) 16 Virginia Law Reg. 219; that of property in the hands of an interstate carrier consigned to another state, in (1912) 12 COLUMBIA LAW REV. 561.

A state "full-crew law," requiring at least three brakemen on freight trains of more than twenty-five cars, was held applicable to interstate trains in *Chicago, R. I. & Pac. Ry.* v. *Arkansas.*[30] Mr. Justice Harlan reviewed prior decisions applying to interstate trains the requirements that no stoves or furnaces may be used in cars and that employees must be examined for color blindness or inebriety, and concluded:

"The principles announced in the above cases require an affirmance of the judgment of the Supreme Court of Arkansas. It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits. . . . The statute here involved is not in any proper sense a regulation of interstate commerce. . . . Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce. . . . Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect of the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and state." [31]

A state requirement that trains run on main lines at night have locomotives equipped with headlights which shall consume not less than 300 watts at the arc and with a reflector not less than 23 inches in diameter was sustained in *Atlantic Coast Line R. Co.* v. *Georgia.*[32] It was urged that, if Georgia were allowed to prescribe such headlights, neighboring states might forbid them and require others of a different sort, and that such possible conflicting requirements would delay and inconvenience interstate traffic. Mr. Justice Hughes answered that similar objections had been held untenable with respect to state prohibitions on the use of stoves in cars, and that if actual conflict between varying state requirements should ensue, the easy remedy is for Congress to take control of the matter.[33]

A municipal ordinance regulating the location and use of the poles of an interstate telegraph company and requiring that some of the wires be

[30] (1911) 219 U. S. 453, 31 Sup. Ct. 275. A state case sustaining a similar statute is considered in (1913) 12 Michigan Law Rev. 500.

[31] (1911) 219 U. S. 453, 465-66.

[32] (1914) 234 U. S. 280, 34 Sup. Ct. 829. A similar state case is treated in (1912) 26 Harvard Law Rev. 757.

[33] A state prescription of automatic couplers is discussed in (1910) 9 Michigan Law Rev. 153. For consideration of the segregation of white and colored passengers on interstate trains see John C. Doolan, *Validity of Separate Coach Laws When Applied to Interstate Passengers* (1913) 1 Virginia Law Rev. 379; and notes in (1912) 26 Harvard Law Rev. 456; (1912) 11 Michigan Law Rev. 337; (1910) 16 Virginia Law Reg. 387.

placed in underground conduits was sustained in *Western Union Telegraph Co.* v. *Richmond.*[34] The city engineer was to determine the size, character and location of poles. The chief of the fire department was to inspect the poles and wires to see that they were not a menace. On designated streets the poles were to be removed and the wires put underground, the company to replace the pavement and save the city harmless from damages. The company was also to save space in its conduits for the wires of third parties who should obtain the consent of the city and pay proper compensation. All these requirements were held to be reasonable. It was pointed out that the city was acting as proprietor of the streets as well as exercising police power to promote safety.

An order of a state commission requiring an interstate railroad to comply promptly with requests for cars for intrastate shipments was involved in *Hampton* v. *St. Louis, Iron M. & S. Ry.*[35] in a proceeding brought in the federal courts to enjoin the bringing of actions in the state courts to enforce penalties for noncompliance, but the objection to the act as a regulation of interstate commerce was not considered, because the state court had held that the provisions of the act with respect to cars for interstate transportation are separable, that any requirements imposed by the commission can be resisted by showing a good excuse for failure to furnish the cars as requested, and the complaining railroad had brought forward no facts showing that the application of the order to intrastate transportation would impose any undue burden on interstate transportation.

Other cases sustained in their application to interstate carriers state police measures not confined to carriers.

International Harvester Co. v. *Kentucky*[36] held that a foreign corporation actually doing business in a state through agents is not rendered immune from service of process by reason of the fact that all of the business done is interstate commerce. The contention to the contrary was declared by Mr. Justice Day to be a novel one and without any decisions to support it. Service of process on foreign corporations engaged exclusively in interstate commerce, like attachment of cars engaged in that commerce or of credits due for interstate transportation, affects interstate commerce only incidentally and falls short of regulating it. The decision was followed in *International Harvester Co.* v. *Kentucky,*[37] another case between the same parties decided on the same day.

The allowance of an attorney's fee of $10 in an action brought in a state court for a liability dependent upon a federal statute applying to interstate shipments was sustained in *Missouri, K. & T. Ry. Co.* v. *Harris.*[38] The fee was imposed only for the successful prosecution of

[34] (1912) 224 U. S. 160, 32 Sup. Ct. 449.
[35] (1913) 227 U. S. 456, 33 Sup. Ct. 263.
[36] (1914) 234 U. S. 579, 34 Sup. Ct. 944.
[37] (1914) 234 U. S. 589, 34 Sup. Ct. 947.
[38] (1914) 234 U. S. 412, 34 Sup. Ct. 790.

claims of less than $200 when such claim was not paid within thirty days after demand. The statute applied to a large number of claims and the fee could not exceed $20. The requirement was likened to a penalty of $50 which had previously been allowed to be imposed by a state for failure of a carrier to settle within ninety days a claim for the loss of interstate freight. This had been called "not an unwarrantable interference with interstate commerce" but "rather a regulation in aid of the performance by the carrier of its legal duty."

A New York statute requiring domestic corporations to pay employees bi-weekly, sustained under the Fourteenth Amendment as an exercise of reserved power to amend corporate charters, was held in *Erie R. R. Co.* v. *Williams*[39] not to be a direct burden on interstate commerce when applied to the employees of an interstate carrier who are employed wholly within the state or whose duties take them from the state into other states. "The effect of the provision," declared Mr. Justice McKenna, "is merely administrative, and so far as it affects interstate commerce, it does so indirectly."

In a number of cases states found the commerce clause a barrier to their efforts to dictate to interstate carriers, or to persons desiring to indulge in interstate transportation.

An attempt by Oklahoma to keep natural gas from being piped to points outside the state was frustrated in *West* v. *Kansas National Gas Co.*[40] over the dissent of Justices Holmes, Lurton and Hughes. The state statute confined the privilege of constructing pipe lines within the state to domestic corporations. One of the conditions of incorporation was that the corporation should transmit gas only between points within the state and should not deliver it to corporations or persons engaged in furnishing gas to points outside the state. Only these domestic corporations thus limited by their charter could receive the right of eminent domain or use the highways of the state for their pipes. Bills to enjoin the enforcement of the statute were brought by foreign corporations which had acquired by purchase private rights of way for the construction of pipe lines to be used exclusively in transporting gas to other states. Two other complainants were citizens of other states. One had received from the Secretary of the Interior a right of way over Indian lands which he proposed to use for a pipe line to take gas from Oklahoma to Kansas. The other owned oil leases in Oklahoma and alleged that the gas he could produce was in excess of the local demand and that he would suffer great loss if prevented from transporting it to points outside the state. It was conceded that pipe lines were the only practicable means of transporting gas from the state and that the enforcement of the statute would prevent all interstate transportation of the commodity. The

[39] (1914) 233 U. S. 685, 34 Sup. Ct. 761.

[40] (1911) 221 U. S. 229, 31 Sup. Ct. 564. See (1911) 25 Harvard Law Rev. 90; (1911) 10 Michigan Law Rev. 135, and (1911) 17 Virginia Law Reg. 401.

state sought to defend its statute as a conservation measure, but Mr. Justice McKenna declined to regard it as such since the only restriction on the use was the prevention of interstate commerce in the gas which persons were free to extract. He conceded the right of the state to preserve the supply of gas by measures not specifically directed against interstate commerce. He distinguished a case which allowed New Jersey to forbid the water from its streams to be piped to New York, on the ground of the limited privilege of persons with respect to the use of water from rivers and the power of a state to prevent its streams from being diverted. His opinion goes beyond what was necessary to support the injunction against the enforcement of the statute when it says:

"We place our decision on the character and purpose of the Oklahoma statute. The State, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the State to make. As said by the Circuit Court of Appeals in the Eighth Circuit, no State can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends." [41]

All that the decision necessarily holds is that foreign corporations cannot be forbidden to run interstate pipe lines over privately purchased rights of way and to cross over or under public highways, but Mr. Justice McKenna seems to imply that the privileges of being a domestic corporation with power of eminent domain and with permission to use the highways longitudinally cannot be withheld from those intending to construct an interstate pipe line when it is granted to those planning to engage only in intrastate transportation.[42]

A request to modify the decree was refused in *Haskell* v. *Kansas Natural Gas Co.*[43] on the ground that the parts of the statute which might be intrinsically valid were affected by the injunction only as parts of the scheme to prevent interstate transportation and that the requirements on domestic corporations were not involved since the complainants in the original proceeding were all foreign corporations which were excluded from the statute by its own terms.

A statute of Kansas which forbade transportation of intoxicating liquors to any place within the state where sale of such liquors was forbidden under the local-option law was held in *Louisville & Nashville*

[41] (1911) 221 U. S. 229, 262, 31 Sup. Ct. 564.

[42] In (1912) 12 COLUMBIA LAW REV. 367 is a note on a state case sanctioning a restriction on the right to develop water power which limits the transmission of the electricity thereby generated to points within the state.

[43] (1912) 224 U. S. 217, 32 Sup. Ct. 442.

R. Co. v. *F. W. Cook Brewing Co.*[44] to be invalid as to transportation from points without the state, and an interstate railroad was enjoined from refusing to transport beer properly tendered for transportation in another state. Mr. Justice Lurton declared that by a long line of decisions it had been determined:

"a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;
b. That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another;
c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition." [45]

The case arose before the Webb-Kenyon Law but after the Wilson Act, which, however, was held not to permit the application of state law prior to delivery to the consignee.[46]

City ordinances requiring vehicles and their drivers to be licensed and the owners of vehicles carrying express packages to give bonds conditioned on safe delivery of packages were held in *Barrett* v. *New York* [47] and *Platt* v. *New York* [48] to be inapplicable to vehicles delivering packages sent to the city from other states. It was doubted whether the ordinances, properly construed, applied to vehicles engaged in interstate commerce, but Mr. Justice Hughes affirmed squarely that, if they did, they constituted an invalid burden on such commerce. "Local police regulations," he said, "cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license." The regulations as to the vehicles were declared not to be in the interest of the safety of street traffic. The qualifications imposed on drivers, even if separable from the other portions of the ordinances, were thought to be too drastic interferences with interstate commerce, since they went beyond provisions designed to exclude incompetent persons, and required drivers to be citizens of the United States or declarants of intention to become such and to have testimonials from residents of the city. As to the testimonials Mr. Justice Hughes observed that "when the importance to the entire

[44] (1912) 223 U. S. 70, 32 Sup. Ct. 189.
[45] *Ibid.* 82.
[46] The question when liquor "arrives" within the state within the meaning of the Wilson Act is dealt with in (1913) 61 Univ. of Pennsylvania Law Rev. 206. State power over liquor after the Webb-Kenyon Act is considered in Winfred T. Denison, *States' Rights and the Webb-Kenyon Liquor Law* (1914) 14 COLUMBIA LAW REV. 321; Allen H. Kerr, *The Webb Act* (1913) 22 Yale Law Journ. 567; Lindsay Rogers, *The Constitutionality of the Webb-Kenyon Bill* (1913) 1 California Law Rev. 499; and in notes in (1914) 14 COLUMBIA LAW REV. 330, 348, 450; (1914) 27 Harvard Law Rev. 763; and (1914) 12 Michigan Law Rev. 584.
[47] (1914) 232 U. S. 14, 34 Sup. Ct. 203. See (1914) 62 Univ. of Pennsylvania Law Rev. 549. The decision in the court below is treated in (1911) 11 COLUMBIA LAW REV. 476.
[48] (1914) 232 U. S. 35, 34 Sup. Ct. 209.

country of promptness and facility in the conduct of the business of the express companies in New York City, and the obvious convenience of their being able to secure drivers in Jersey City, as well as in New York, are considered, the provision would seem to be unnecessarily burdensome." The sums demanded for licenses were held not to belong to the category of inspection fees, and the requirement of bonds conditioned on safe delivery was held to be connected with the requirement of a license and to fall with it. Apparently no contention was made that the delivery within the city was distinct from the previous interstate shipment. It appeared that 98% of the packages delivered in the wagons in question came from other states and that "it being impracticable to effect a separation, the local and the other intrastate shipments are handled in the same vehicles, and by the same men, that are employed in connection with the interstate transportation." The opinion leaves us to assume that wagons and drivers engaged in delivering packages from other states would be immune from the requirements without regard to their carrying also intrastate express, though previously the complainants had voluntarily submitted to the licensing of a fraction of their vehicles on account of the intrastate business done.

In *Yazoo & Mississippi Valley R. Co.* v. *Greenwood Grocery Co.*[49] a state demurrage law imposing penalties for delay in delivering cars at the termination of interstate transportation was held an invalid interference with interstate commerce even in the absence of federal regulation of the subject. Part of the penalties imposed for violation of the order of the state commission had accrued before the effective date of the Hepburn Law by which Congress took possession of the subject. This part would have been sustained had the state commission kept within reasonable limits. These limits were held to have been transcended because the time allowed for delivery was only twenty-four hours from seven A. M. of the day following arrival and because the requirement for delivery within that period was absolute "and makes no allowance whatever for any justifiable and unavoidable cause for the failure to deliver."

An order by a state agency to remove a railroad bridge over which interstate trains were run was held an invalid regulation of interstate commerce in *Kansas City S. R. Co.* v. *Kaw Valley Drainage District.*[50] The state court had been asked to order the bridge to be raised in order to prevent the river beneath from periodically overflowing its banks. Appreciating that existing federal legislation prevented it from requiring a new structure without the authority of the Secretary of War, the state court had sought to accomplish this indirectly by ordering the owner of the bridge to clear the channel of all obstructions up to a designated height. This moved Mr. Justice Holmes to say:

[49] (1913) 227 U. S. 1, 33 Sup. Ct. 213.
[50] (1914) 233 U. S. 75, 34 Sup. Ct. 564.

"They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the States. But that subject-matter is under the exclusive control of Congress and is not one that it has left to the States until there shall be further action on its part. The freedom from interference on the part of the State is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. . . .

"The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic'. . . . To destroy the bridges across which these railroad lines necessarily pass is at least as direct an interference with such commerce as to prohibit the importation of cattle or oleomargarine, or the export of natural gas. . . . Furthermore in the present case it is not pretended that local welfare needs the removal of the defendant's bridges at the expense of the dominant requirements of commerce with other States, but merely that it would be helped by raising them. The fact that the [state] court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass."[51]

In two cases attempts to regulate the doing of business by foreign corporations ran afoul of the commerce clause.

In *Buck Stove & Range Co.* v. *Vickers*[52] a foreign corporation engaged exclusively in interstate commerce successfully adduced the commerce clause against a state statute excluding it from doing business in the state until it filed with the secretary of state a copy of its charter and its consent to recognize service of process upon that officer as service on it, paid a filing fee of $25 and contributed to the state school fund a specified per cent of its authorized capital. The statute further provided that foreign corporations not complying with these initial demands and with further annual requirements should not be permitted to sue in the courts of the state. The principal case reaffirmed an earlier one[53] and added nothing to what previously had been laid down. The cases do not necessarily go further than to hold that these requirements cannot be imposed as a condition of doing interstate commerce and that the exclusion from the state courts which is provided for in the same section with the exclusion from interstate commerce necessarily falls with it. It has since been held that a state cannot close its courts to suits arising out of interstate transactions,[54] but it is still

[51] *Ibid.* 78-79.

[52] (1912) 226 U. S. 205, 33 Sup. Ct. 41. Mr. Justice Pitney did not sit.

[53] See *International Textbook Co.* v. *Pigg* (1910) 217 U. S. 91, 30 Sup. Ct. 481, commented on in (1910) 16 Virginia Law Reg. 143.

[54] *Sioux Remedy Co.* v. *Cope* (1914) 235 U. S. 197, 35 Sup. Ct. 57, discussed in (1915) 49 American Law Rev. 601; (1915) 63 Univ. of Pennsylvania Law Rev. 433; and in (1915) 2 Virginia Law Rev. 470. In (1911) 24 Harvard Law Rev. 230 is a discussion of a state decision excluding from the state courts a foreign

an open question whether foreign corporations engaged exclusively in interstate commerce may be required to comply with reasonable state regulations provided the enforcement of the requirements stops short of forbidding the doing of interstate commerce.[55]

A statute of Oklahoma requiring the secretary of state to revoke the license of any foreign corporation which removes to a federal court a case brought against it in the state court was held in *Harrison* v. *St. Louis & S. F. R. R. Co.*[56] to be an unconstitutional interference with the exercise of jurisdiction by the federal courts, and the secretary of state was enjoined from revoking the license to do business on the ground alleged. The decision means that the company must still be free to do intrastate as well as interstate commerce. It is familiar that no state license is needed or can be demanded to do interstate commerce alone. While the ground of the decision is the unconstitutional interference with the jurisdiction of the federal courts, the interstate commerce clause came in to distinguish the case from earlier ones in which states had been allowed to expel foreign insurance companies which had removed cases to the federal courts. Chief Justice White does not declare explicitly that the expulsion for the cause assigned is an invalid regulation of interstate commerce but he escapes the force of earlier decisions by pointing out that they involved corporations not engaged in interstate commerce. His exact words are as follows:

"Those cases involved state legislation as to a subject over which there was complete state authority, that is, the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was within its complete control, even though an unlawful motive might have impelled the State to exert its lawful power. But that the application of those cases to a situation where complete power in a State over the subject dealt with, does not exist, has since been so repeatedly passed upon as to cause the question not to be open." [57]

The complaint that state police regulation of occupations interfered unconstitutionally with interstate commerce was rejected in several cases.

Brodnax v. *Missouri*[58] involved a statute making it unlawful to keep a place where stocks or bonds or provisions are sold without being actually paid for and delivered, without causing a record of the sale to be made in a book kept for that purpose and a memorandum of the trans-

corporation which had not appointed an agent on whom process might be served. The ground of the decision, however, was that the display of advertising signs brought from without the state is not interstate commerce.

[55] See Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918) 2 Harvard Studies in Jurisprudence 125.

[56] (1914) 232 U. S. 318, 34 Sup. Ct. 333. See (1914) 14 COLUMBIA LAW REV. 454. Part of the same general problem is discussed in (1911) 59 Univ. of Pennsylvania Law Rev. 256.

[57] (1914) 232 U. S. 318, 332, 34 Sup. Ct. 333, 337.

[58] (1911) 219 U. S. 285, 31 Sup. Ct. 238.

action to be delivered to the purchaser and to have affixed to it a stamp of the value of 25 cents to be purchased from the state auditor. After noting that the only proof was that some of the commodities thus sold were in interstate transportation at the time, Mr. Justice Harlan quoted with approval the comment of the state court that the statute is directed only at sales at certain places, that the sales did not contemplate or have anything to do with interstate transportation and that the fact that the parties or either of them were residents of other states in no way affected the transaction. To this he added that "the indictment deals with the *place* where sales, such as the statute describes, are made" and that "the offense is complete under the statute, by the keeping of such a place, and that occurs before any question of interstate commerce could arise, so far as this record discloses."

A statute of New York requiring private bankers to be licensed and to deposit securities with the state comptroller and file a bond was sustained in *Engel* v. *O'Malley* [59] against objections based on the Fourteenth Amendment and on the commerce clause. On the commerce question Mr. Justice Holmes said:

"When, as in this matter, the Constitution takes from the States only a portion of their otherwise absolute control, there may be expected difficulties in drawing the dividing line, because where it shall be put is a question of more or less. The trouble is inherent in the situation, but it is the same in kind that meets us everywhere else in the law. The question is whether the state law creates a direct burden upon what it is for Congress to control, and the facts of the specific case must be weighed. In doing so we recur to what we have said above, that we cannot regard the statement of the plaintiff's business in his bill as describing the receipt of bailments for the transmission of the identical objects received to other States. Neither do we regard the law as having had such bailments primarily in mind. Under the statement in the bill and the words of the law, we must take it that the money received even when received for transmission becomes the money of the depositary and his obligation that of a debtor under contract to pay as may be directed. Presumably the depositor retains the right to call for his money himself or to change any direction that may have been given, until the money has left the 'private banker's' hands. The law, as was said of a similar one by the New York Court of Appeals, was passed for the purpose of regulating and safeguarding the business of receiving deposits, which precedes and it is not to be confounded with the later transmission of money, although leading to it. . . . The fact that it is very likely to lead to it does not change the result." [60]

Prior to 1910 it had been held that in the absence of conflicting federal action a state may apply, even to articles in the original package in which they have come from other states, police measures imposing standards of quality on fertilizers offered for sale and forbidding entirely the sale of oleomargarine colored to resemble butter. These rulings were

[59] (1911). 219 U. S. 128, 31 Sup. Ct. 190.
[60] *Ibid.* 138-39.

followed in *Savage* v. *Jones*[61] in sustaining a state statute forbidding the sale of feeding stuffs not containing the specified quantity of fat and protein and requiring all such products to be inspected and certified and labelled. The opinion states that the state requirements were enforced against goods of extra-state origin still in the original packages, but this point is not commented on in the reasoning.[62] A limitation on the exercise of this state power is implied in the statement that it does not appear that the standards of quality set up by the state board were arbitrary. The contention that the fees charged for the inspection made the law a disguised revenue measure and so unconstitutional as state taxation of interstate commerce was rejected as unsupported by proof of the fact requisite to bring the invoked principle into play.

The same rulings on these several points are made in *Standard Stock Food Co.* v. *Wright.*[63] The principle is applied to illuminating oils in *Red "C" Oil Mfg. Co.* v. *Board of Agriculture.*[64] An objection to a Kansas law, prescribing the size of the package in which explosive powder may be sold, as an unconstitutional interference with interstate commerce was technically left unconsidered in *Williams* v. *Walsh* [65] because the complainant had not shown that his powder came from without the state; but Mr. Justice McKenna was careful to avoid any implication "that if such proof had been made, it would have been a defense," and observed that "powder is an explosive, dangerous to handle, the degree of danger corresponding to its quantity" and "it is subject, therefore, to a measure of regulation from which harmless articles of commerce may be exempt." An oyster inspection law was declared in *D. E. Foote & Co.* v. *Stanley* [66] to be an unconstitutional regulation of interstate commerce because the fees imposed for the inspection were so high as to amount to taxation of such commerce. This case and the fiscal aspects of the other inspection statutes reviewed in this paragraph will be dealt with in a later article reviewing decisions on state taxation and interstate commerce.

[TO BE CONCLUDED]

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[61] (1912) 225 U. S. 501, 32 Sup. Ct. 715.

[62] In (1911) 24 Harvard Law Rev. 324 is comment on a state case restricting a state food law to food not in the original package. In (1910) 10 COLUMBIA LAW REV. 570 is a note on a state case holding that a state statute on dead game does not apply to game in interstate transit until after it reaches the consignee. In (1912) 26 Harvard Law Rev. 78, 88, is discussion of an opinion declaring that a state statute requiring the marking of convict-made goods would be an unconstitutional interference with interstate commerce if applied to goods of extrastate origin.

[63] (1912) 225 U. S. 540, 32 Sup. Ct. 784. See (1912) 18 Virginia Law Reg. 300.

[64] (1912) 222 U. S. 380, 32 Sup. Ct. 152. The decision in the court below is discussed in (1910) 10 COLUMBIA LAW REV. 72.

[65] (1912) 222 U. S. 415, 32 Sup. Ct. 137.

[66] (1914) 232 U. S. 494, 34 Sup. Ct. 377. See (1914) 14 COLUMBIA LAW REV. 532.